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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PACIFIC TORREY RESERVE HOLDINGS, LP, Plaintiff and Appellant, v. CITY OF SAN DIEGO, Defendant and Respondent.	D052390 (Super. Ct. No. GIC851874)

APPEAL from a postjudgment order of the Superior Court of San Diego County, Michael M. Anello, Judge. Reversed.

Pacific Torrey Reserve Holdings, LP (Pacific Torrey) sued the City of San Diego (the City) for declaratory relief to resolve a dispute over the interpretation of a development agreement. After obtaining the declaratory relief it sought, Pacific Torrey moved under section 2033.420[1] to recover the attorney fees and costs it incurred to prove the truth of six requests for admissions (RFAs) the City had denied. The trial court

1 Unless otherwise specified, further statutory references are to the Code of Civil Procedure.

denied Pacific Torrey's motion and the sole issue raised in this appeal is whether the trial court abused its discretion in doing so. We conclude the trial court did abuse its discretion and we reverse and remand the matter for further proceedings.

I

In 1989, the City entered into the Sorrento Hills Development Agreement (Agreement) with several property owners, including Pacific Torrey's predecessor-in-interest. The Agreement established the maximum buildable square feet of industrial and commercial uses for each covered property. For industrial uses, described as small industrial buildings of less than 100,000 square feet and large commercial office buildings of more than 100,000 square feet, the Agreement assumed each 1,000 square feet of building would generate 15 average daily trips (ADTs) of traffic (industrial traffic conversion factor). For commercial and office uses, described as small commercial office buildings of less than 100,000 square feet and small industrial/business park buildings of less than 100,000 square feet, the Agreement assumed each 1,000 square feet of building would generate 20 ADTs (commercial traffic conversion factor). Applying these two traffic conversion factors to the established maximum buildable square feet produced a maximum number of ADTs that could be generated by the future development of each property. However, to permit flexibility in future development projects, the Agreement allowed the property owners to transfer ADTs among one another and to vary the actual size, use, and character of future development projects as long as the property owners had sufficient ADTs available. Accordingly, the Agreement anticipated the established maximum buildable square feet for a property would change if

the ADTs assigned to the property increased or decreased and/or if the property owner constructed uses with different traffic conversion factors than assumed by the Agreement.

In 1993 Pacific Torrey's predecessor obtained the City's approval to develop over 450,000 square feet of commercial and office space on its property covered by the Agreement (1993 project). The 1993 project included visitor-serving commercial uses, such as banks, drive-thru restaurants, and gas stations. In determining whether Pacific Torrey's predecessor had sufficient ADTs for the 1993 project, the City utilized the industrial traffic conversion factor for the 1993 project's office uses and the commercial traffic conversion factor for the 1993 project's visitor-serving commercial uses.

In 1998 Pacific Torrey's predecessor obtained the City's approval to add an educational use to its property and to extend a daycare use on its property to off-site patrons (1998 projects).[2] In determining whether Pacific Torrey's predecessor had sufficient ADTs for the 1998 projects, the City utilized traffic conversion factors different from those specified in the Agreement because the Agreement did not contemplate these uses and they were expected to generate greater traffic than accounted for by the Agreement's traffic conversion factors.

In 2000 Pacific Torrey submitted an application to the City to build additional commercial space on its property (2000 project). The 2000 project initially consisted of a single, 41,000 square foot commercial office building. Labib Qasem, the City traffic engineer assigned to review the transportation aspects of the 2000 project, determined the

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2 When the City initially approved it, the daycare use was limited to on-site patrons.

commercial traffic conversion factor applied to the 2000 project and Pacific Torrey had sufficient ADTs available for it.

Pacific Torrey subsequently redesigned the 2000 project to consist of more than one building and to include visitor-serving commercial uses, such as banks, restaurants, and medical offices. Because the Agreement did not specifically discuss the traffic conversion factor for visitor-serving commercial uses, Qasem determined neither of the Agreement's traffic conversion factors applied to these uses notwithstanding the City's previous application of the Agreement's commercial traffic conversion factor for the 1993 project's visitor-serving commercial uses. Instead, Qasem utilized other traffic conversion factors and determined the 2000 project exceeded Pacific Torrey's remaining available ADTs.

Pacific Torrey disputed Qasem's determination, maintaining the City was obliged by the Agreement and the parties' course of dealing in connection with the 1993 project to apply the commercial traffic conversion factor to the 2000 project's visitor-serving commercial uses. In an effort to informally resolve the dispute, Pacific Torrey met with City representatives, including Qasem and Gary Halbert, the City's then director of development services and final staff-level decision maker. Both Qasem and Halbert had worked on the 1998 projects, but neither had worked on the 1993 project. Although the details of the parties' discussion are not revealed in the record, the record is clear the parties did not resolve their dispute during the meeting.

After the meeting, Pacific Torrey's counsel sent the City Attorney's Office a letter explaining why, in Pacific Torrey's view, the City must use the Agreement's traffic

conversion factors for the 2000 project. The City Attorney's Office sent Pacific Torrey's counsel a response letter rejecting Pacific Torrey's position. Pacific Torrey then filed this declaratory relief action.

During discovery, Pacific Torrey served the City with RFAs. RFA Nos. 38 through 43 are the subject of this appeal. RFA Nos. 38 and 39 asked the City to admit the traffic conversion factor for industrial uses is specified in the Agreement and is 15 ADTs per 1,000 square feet of building. RFA Nos. 40 and 41 asked the City to admit the traffic conversion factor for commercial and office uses is specified in the Agreement and is 20 ADTs per 1,000 square feet of building. RFA No. 42 asked the City to admit the traffic conversion factor of 15 ADTs per 1,000 square feet of building determined how many square feet of industrial space Pacific Torrey could construct on its property. Lastly, RFA No. 43 asked the City to admit the traffic conversion factor of 20 ADTs per 1,000 square feet of building determined how many square feet of commercial and office[3] space Pacific Torrey could construct on its property.

The City initially responded by objecting to the RFAs and admitting only that the Agreement contained certain quoted text. The City then supplemented its responses, admitting the Agreement contained the industrial and commercial traffic conversion factors, but stating the City did not have sufficient information to admit or deny whether these traffic conversion factors applied to all industrial and commercial and office uses in the Sorrento Hills area or on Pacific Torrey's property. The City supplemented its

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3 The RFA actually stated "industrial," but the City recognized this was a typographical error and was intended to state "commercial and office."

responses again and ultimately denied the RFAs, stating the Agreement's traffic conversion factors apply only to the types of uses specifically listed in the Agreement (i.e., small industrial buildings of less than 100,000 square feet, large commercial office buildings of more than 100,000 square feet, small commercial office buildings of less than 100,000 square feet, and small industrial/business park buildings of less than 100,000 square feet). Implicit in these denials is a denial that the Agreement's commercial traffic conversion factor applied to the visitor-serving commercial uses included in the 2000 project. Halbert verified the denials.

Shortly after the City denied the RFAs, Pacific Torrey's counsel showed Halbert a 1993 memo from the then city manager and city attorney to the then city council discussing the 1993 project (1993 memo). The 1993 memo concluded, as Pacific Torrey asserted, that the commercial traffic conversion factor applied to small visitor-serving commercial buildings.

Pacific Torrey listed the 1993 memo as a document supportive of its position in its responses to the City's discovery requests, which preceded the City's denials of the RFAs. In addition, Robert Korch, one of Halbert's subordinates and the City staff member initially responsible for managing the City review process for the 2000 project, knew about the 1993 memo and its import because he helped prepare it. Nonetheless, Halbert was not aware of the 1993 memo before Pacific Torrey's counsel showed it to him. Halbert never consulted Korch or anyone else about the Agreement's interpretation because, in his view, the Agreement was unambiguous. Moreover, Korch was reassigned (for unrelated reasons) shortly after the parties' dispute arose. Presumably because of the

reassignment, Korch did not participate in the parties' prelitigation conflict resolution meeting although he ordinarily would have done so.

After reviewing the 1993 memo, Halbert acknowledged it supported Pacific Torrey's position and agreed the commercial traffic conversion factor applied to the 2000 project's visitor-serving commercial uses. Although the City did not amend or further supplement its responses to RFA Nos. 38 through 43 after Pacific Torrey confronted the City with the 1993 memo, the City promptly sent Pacific Torrey a letter agreeing to apply the Agreement's traffic conversion factors to the 2000 project in the manner advocated by Pacific Torrey and to expedite the processing of it.[4]

Notwithstanding the City's concession, Pacific Torrey moved for summary judgment. The City opposed the motion, but did not dispute the merits of Pacific Torrey's position. Instead, the City argued the action was no longer justiciable because the City no longer disputed Pacific Torrey's interpretation of the Agreement. In addition, the City argued Pacific Torrey had failed to exhaust its administrative remedies before

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4 Pacific Torrey contends the City later reneged on this commitment as evidenced by two subsequent letters requiring Pacific Torrey to submit a traffic analysis using current traffic conversion factors. The letters do not support Pacific Torrey's contention. Collectively, the City's letters explain that the California Environmental Quality Act (CEQA) requires the City to analyze a project's traffic impacts with current data and, therefore, the City needed Pacific Torrey to submit a current traffic analysis for the 2000 project. The City further explained it would use the Agreement as support for a statement of overriding considerations should the current traffic analysis identify any unmitigated traffic impacts. The City also informed Pacific Torrey that Pacific Torrey would need to apply for a community plan amendment in addition to the other approvals Pacific Torrey sought because, while the parties' dispute was pending, the City had lost five lawsuits involving the issue of whether a community plan amendment was required for similar projects under similar circumstances.

filing the action. The City also filed its own motion for summary judgment raising these same points.

The trial court granted Pacific Torrey's motion and denied the City's motion, finding there remained an actual controversy between the parties and Pacific Torrey was entitled to declaratory relief. The court entered judgment declaring the City must apply the Agreement's commercial traffic conversion factor to the visitor-serving commercial uses included in the 2000 project. The City did not appeal the judgment.

Pacific Torrey then moved to recover the attorney fees and costs it incurred in proving the truth of RFA Nos. 38 through 43.[5] Pacific Torrey argued it was entitled to recover its expenses under section 2033.420 because the 1993 memo, which was part of the City's records, showed the City had no reasonable basis for denying the RFAs.

The City opposed the motion, arguing that, at the time it responded to the RFAs, it had not discovered the 1993 memo and legitimately disputed Pacific Torrey's interpretation of the Agreement. Therefore, it had good cause for not admitting the RFAs. The City further argued that, once the City discovered the 1993 memo, it no longer disputed Pacific Torrey's interpretation and agreed to process the 2000 project consistent with this interpretation.

The trial court denied Pacific Torrey's motion, finding "[o]ther good cause for the failure to admit existed on the part of the City, at least for a time. [Halbert] and city staff

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5 Between the time the court granted Pacific Torrey's motion for summary judgment and the time the court heard Pacific Torrey's motion for costs of proof, a new trial judge had been assigned to the case.

for a time entertained a reasonable interpretation of the Development Agreement's definition of ADTs contrary to that of [Pacific Torrey]. Ultimately, [Halbert] and staff agreed with [Pacific Torrey's] interpretation of the ADTs."

Pacific Torrey appeals, arguing the trial court abused its discretion in denying the motion. More particularly, Pacific Torrey contends the City did not have good cause to deny the RFAs because the City did not conduct a reasonable investigation before doing so. We agree.

II

"[A] party that denies a request for admission may be ordered to pay the costs and fees incurred by the requesting party in proving that matter. The court 'shall' order the payment of such fees and costs unless it finds: (1) that an objection to the request was sustained or a response to the request was waived; (2) the admission sought was of no substantial importance; (3) the party failing to make the admission had reasonable ground to believe that the party would prevail on the matter; or (4) there was other good reason for the failure to admit the request. (Code Civ. Proc., § 2033.420, subd. (b).)" (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1276.) We review the trial court's decision whether to grant or deny a motion for costs of proof under section 2033.420 for abuse of discretion. (*Laabs v. City of Victorville*, at pp. 1275-1276; *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 637, fn. 10; *Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 508 (*Brooks*).) "An abuse of discretion occurs only where it is shown that the trial court exceeded the bounds of reason. [Citation.] It is a deferential standard of review that requires us to uphold the trial court's determination,

even if we disagree with it, so long as it is reasonable. [Citation.]" (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864.) We conclude the court abused its discretion in this case because its decision was unreasonable under the circumstances.

When the parties' dispute over the 2000 project arose, their course of dealing included the 1993 project, to which the City applied the Agreement's commercial traffic conversion factor for visitor-serving commercial uses, and the 1998 projects, to which the City applied other traffic conversion factors for daycare and educational uses. The City's handling of the 1993 project supported Pacific Torrey's interpretation of the Agreement and the City's handling of the 1998 projects supported Halbert's. While Halbert only had firsthand experience with the 1998 projects, he was not free to ignore the 1993 project and its potential bearing on the parties' dispute and the City's responses to the RFAs. "[S]ince requests for admissions are not limited to matters within [the] personal knowledge of the responding party, that party has a duty to make reasonable investigation of the facts before answering items which do not fall within his personal knowledge. [Citations.]" (*Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 273; accord, *Wimberly v. Derby Cycle Corporation*, *supra*, 56 Cal.App.4th at p. 634; *Brooks*, *supra*, 179 Cal.App.3d at p. 510.)

Furthermore, Halbert had two readily apparent means of discovering the 1993 memo and its import before he verified the City's RFA responses. First, Halbert could have reviewed the documents Pacific Torrey listed in its discovery responses as supportive of its position. Most of the documents, including the 1993 memo, appear to

be City records. While the list is long, nothing in the record suggests Halbert lacked the opportunity or ability to review the documents.

Alternatively, Halbert could have consulted Korch about the dispute. Korch worked for Halbert and, although Korch was reassigned to other matters after the dispute arose, nothing in the record suggests Korch was unavailable to Halbert. Moreover, Korch was the last City staff member to actively manage the City's review process for the 2000 project before the dispute arose and, presumably but for his reassignment, he would have been involved in the parties' prelitigation dispute resolution meeting. Consequently, it is reasonable to expect Halbert to consult Korch.

Because Halbert did not have personal knowledge of and did not make a reasonable investigation of the relevant facts, the City did not have good cause to deny the RFAs. (*Brooks*, *supra*, 179 Cal.App.3d at p. 510 [when a party denies an RFA in circumstances where the party lacked personal knowledge but had available sources of information and failed to make a reasonable investigation, an award of costs of proof is justified]; *Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 198.) Accordingly, the trial court abused its discretion in denying Pacific Torrey's motion for costs of proof.

Because the trial court never reached the issue of the reasonableness of Pacific Torrey's claimed expenses, we do not address it. Nonetheless, we note once Halbert learned of the 1993 memo, he quickly concluded it supported Pacific Torrey's interpretation of the Agreement. The City then stopped disputing Pacific Torrey's position and sent Pacific Torrey a letter confirming this. On remand, the trial court may

consider the City's prompt attempt to resolve the matter after learning of the 1993 memo in determining the reasonableness Pacific Torrey's claimed expenses. (*Brooks, supra*, 179 Cal.App.3d at p. 511, fn. 6.)

The trial court may also consider Pacific Torrey's actions. Given the City's speedy concession after Halbert learned of the 1993 memo, we question why Pacific Torrey did not confront the City with the 1993 memo earlier. At oral argument, Pacific Torrey's counsel represented the 1993 memo was referenced in and attached to its prelitigation letter to the City Attorney's Office. However, we cannot confirm this representation with the record before us. The record before us also does not show the 1993 memo was discussed during the parties' prelitigation conflict resolution meeting or when the parties met and conferred regarding the City's responses to the RFAs. The first substantive reference we find by Pacific Torrey to the 1993 memo is in Pacific Torrey's first amended complaint, which was filed after the City denied the RFAs and after Pacific Torrey's counsel showed the memo to Halbert. If, as it appears, Pacific Torrey did not avail itself of key opportunities to avoid or resolve the discovery dispute, the trial court may consider this in determining the reasonableness of Pacific Torrey's claimed expenses. (*Brooks, supra*, 179 Cal.App.3d at p. 510.)

DISPOSITION

The order is reversed. The matter is remanded to the trial court for further proceedings consistent with this decision. Appellant is awarded costs on appeal.

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MCCONNELL, P. J.

WE CONCUR:

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HUFFMAN, J.

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IRION, J.